



ENTERED
08/24/2009

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

IN RE:	§	
GREGORIO B VILLARREAL; dba	§	Case No. 08-70002
GREG'S BALLROOM; aka	§	
VILLARREAL, <i>et al</i> ,	§	
Debtor(s).	§	
	§	Chapter 13
	§	
GREGORIO B VILLARREAL; aka	§	
VILLARREAL; dba GREG'S	§	
BALLROOM, <i>et al</i> ,	§	
Plaintiff(s)	§	
	§	
VS.	§	Adversary No. 08-7001
	§	
DAVID W SHOWALTER, <i>et al</i> ,	§	
Defendant(s).	§	Judge Isgur

MEMORANDUM OPINION

This Memorandum Opinion is issued in support of the Court's Certification for Direct Appeal issued on this date.

Procedural Issues

Following trial, this Court issued its Judgment and Memorandum Opinion on August 5, 2009. A timely notice of appeal was filed by the Defendant on August 12, 2009 (docket #101). A timely notice of cross appeal was filed by the Plaintiff on August 21, 2009 (docket #104).

The appeal has not yet been docketed under Fed. R. Bankr. P. 8007(b).

Certifications for Direct Appeal are governed by 28 U.S.C. § 158(d)(2) and Fed. R. Bankr. P. 8001(f).

No request for certification has been filed by the parties. Accordingly, this certification is issued pursuant to 28 U.S.C. § 158(d)(2)(B)(i) and Fed. R. Bankr. P. 8001(f)(4).

Standards for Certification

28 U.S.C. § 158(d)(2)(A) lists three disjunctive standards regarding direct appeals. Only the first is relevant here. That provision provides for a direct appeal if—

The judgment . . . involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States

28 U.S.C. § 158(d)(2)(A)(i).

This Court's judgment was based on its Memorandum Opinion in which the Court applied 11 U.S.C. § 547 to a transfer of property that was sold at a regularly conducted state law foreclosure sale. The transfer enabled the foreclosing creditor to receive in excess of \$3,000,000 in value for its \$100,000 claim. The Court held that the transfer was an avoidable preference under § 547.

There is no controlling decision of the Fifth Circuit Court of Appeals or of the United States Supreme Court.

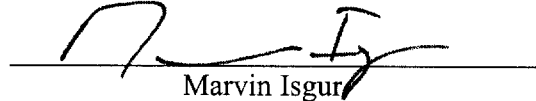
This Court determined that *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) did not apply to avoidance claims brought under § 547 of the Bankruptcy Code. In *BFP*, the Supreme Court held that the final bid price received at a non-collusive foreclosure sale conducted in accordance with the applicable state law was, as a matter of law, "reasonably equivalent value" under § 548. *Id.* at 545. This Court relied upon the Fifth Circuit's analysis in *Stone*—which extended *BFP* to actions under § 549—in declining to extend *BFP* to actions under § 547. *See In re T.F. Stone Co. v. Harper*, 72 F.3d 466 (5th Cir. 1995). In *Stone*, the Fifth Circuit compared § 548 and § 549 to determine the meaning of "present fair equivalent value" in § 549, within the context of a tax foreclosure sale. The court found no meaningful difference between "present fair equivalent value" in § 549(c) and "reasonably equivalent value" in § 548, as applied in the context of a forced-sale case. *Id.* at 470. The Fifth Circuit did not automatically determine that *BFP*'s analysis would apply to every avoidance action under the Bankruptcy Code. Instead, it compared the structure and language of § 549 to that of § 548. This Court followed the Fifth Circuit in determining whether the structure, language, and logic of § 547 is similarly comparable. As set forth in this Court's Memorandum Opinion, this Court concluded that § 547 does not have the same or similar language as either § 547 or § 549. Instead, the plain language of § 547 compelled a different result.

The Court notes that a cross-appeal has been filed. The cross-appeal is only relevant if this Court's decision is reversed. The cross-appeal does not raise a significant legal issue but apparently questions whether the Court properly interpreted the underlying facts.

Conclusion

Because this Court's judgment reaches a decision on a bankruptcy issue not previously decided by this Circuit or by the Supreme Court, this Court certifies this matter for a direct appeal to the United States Court of Appeals for the Fifth Circuit.

SIGNED August 24, 2009.


Marvin Isgur
UNITED STATES BANKRUPTCY JUDGE